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Supreme Court, U.S.
FILED

No. 10-578 OCT 29 2010

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In The

Supreme Court of the United States

WAGONER COUNTY RURAL
WATER DISTRICT NO. 2, *et al.*,

Petitioners,

v.

GRAND RIVER DAM AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960), the Grand River Dam Authority (GRDA), an agency of the state of Oklahoma, claimed a vested interest in the waters of the Grand River and that such interest was private property. 1959 WL 101255 (U.S.) GRDA sought to trace title in the waters of the Grand River to itself, through the Cherokee Tribe. *Grand River Dam Authority* at 233-34. This Court rejected GRDA's claim citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87-88 (1922), which held "[T]he title of the Indians grows out of a federal grant when the Federal government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title." *Grand River Dam Authority* at 233.

QUESTION PRESENTED – Continued

In *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008), the Court held that it is well-established that Oklahoma does not enjoy an ownership interest in water resources located in the state, citing *Sporhase v. Nebraska*, 458 U.S. 941, 950-52 (1982). This Court concluded that state ownership over water resources is a legal fiction. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982).

Oklahoma has declared ownership to itself in the waters of the Grand River under the authority of Oklahoma Statute, Title 82, Section 862.

Whether The Grand River Dam Authority, An Agency Of Oklahoma, Can Declare Ownership Of The Waters Of The Grand River To Itself Pursuant To An Oklahoma Statute.

LIST OF PARTIES

The names of the Petitioners are:

Wagoner County Rural Water District No. 2,
Wagoner County Rural Water District No. 7,
Wagoner County Rural Water District No. 9,
Cherokee County Rural Water District No. 11,
Peggs Water Company, and
Tri-B Nursery, Inc.

The name of the Respondent is:

Grand River Dam Authority, an agency of the state of Oklahoma.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company, and Tri-B Nursery, Inc.. petition the Court for a Writ of Certiorari to review a final judgment of the Court of Civil Appeals of Oklahoma entered May 7, 2010 affirming a district court of Craig County, Oklahoma dismissal of Petitioners' state court petition and final judgment of the Oklahoma Supreme Court entered on September 20, 2010 denying Petitioners' timely filed Petition for Certiorari for review of the decision of the Court of Civil Appeals.

OPINIONS BELOW

The opinion of the district court of Craig County, Oklahoma dismissing Petitioners' state court petition is not reported and is included in the Appendix. App., *infra*, at 20a. The opinion of the Court of Civil Appeals of Oklahoma (Fischer, Wiseman, and Barnes, JJ.) affirming the district court's dismissal of the Petitioners' state court petition is reported at ___ P.3d ___, 2010 WL 4058493 (Okla. Civ. App. Div. 2), 2010 OK CIV APP 95, and is included in the Appendix. App., *infra*, at 1a. The judgment of the Supreme Court of Oklahoma denying Petitioners' Petition for Certiorari is not reported and is produced in the Appendix. App., *infra*, at 23a.

STATEMENT OF JURISDICTION

The judgment of the Court of Civil Appeals of Oklahoma (Fischer, Wiseman, and Barnes, JJ.) affirming a district court dismissal of the Petitioners' state court petition was entered on May 7, 2010. App., *infra,* at 1a. The judgment of the Oklahoma Supreme Court denying Petitioners' Petition for Certiorari was entered on September 20, 2010. App., *infra,* at 23a. Title 12, Oklahoma Statutes, Ch. 15, App. 1, Rule 1.13 forbids a motion for rehearing of a denial of a Petition for Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3, of the United States Constitution

> "The Congress shall have Power. . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Oklahoma Statute, Title 82, Section 862

> The district shall have and is hereby authorized to exercise the following powers, rights and privileges: (a) To control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district; . . .

(For the complete text of Title 82, Section 862, see App., *infra*, at 25a).

STATEMENT OF THE CASE

GRDA was created by the Oklahoma Legislature in 1935 pursuant to 82 O.S. § 861, *et seq.* which conferred on GRDA the right "[t]o control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district. . . ." 82 O.S. § 862, App., *infra*, at 25a.

After its creation, GRDA surveyed the Grand River and adopted a plan for the creation of three dams along the Grand River at Pensacola, Markham Ferry and Fort Gibson. *Grand River Dam Authority v. United States*, 175 F.Supp. 153, 155 (1959). By 1940, GRDA had constructed the Pensacola Dam and had acquired lands, easements and rights of way and had constructed facilities for the connection of the Pensacola project with the dams contemplated at Markham Ferry and Fort Gibson. *Id.* However, before GRDA could build the Fort Gibson Dam, the United States Congress passed the Flood Control Act of 1941 which authorized the construction of three dams along the Grand River by the U.S. *Id.* The U.S. undertook the construction of the Fort Gibson Dam on its own and completed its construction in 1950. *Id.*

GRDA owns and operates the Pensacola Dam and Markham Ferry Dam situated on the Grand River. *United States v. Grand River Dam Authority*, 363 U.S. 229, 230 (1960). The U.S. acting through the U.S. Army Corps of Engineers owns and operates the Fort Gibson Dam. *Id.*

Four of the Petitioners appropriate water directly from the Fort Gibson Reservoir (i.e., water impounded by the Fort Gibson Dam and standing on land owned by the Army Corps of Engineers). Petitioner Cherokee County Rural Water District No. 11 appropriates water from a stream which passes over and through its land and flows into the Fort Gibson Reservoir. Petitioner Peggs Water Company appropriates groundwater from a water well on its own land. App., *infra*, at 44a. None of the Petitioners appropriate water from any point above where the Grand River enters the Fort Gibson Reservoir or any water standing on land owned by GRDA.

In *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960), GRDA contended it could trace title to the waters of the Grand River to itself. This contention was rejected by this Court. GRDA now maintains that it derives ownership of the waters of Grand River through an Oklahoma Statute, Title 82, § 862. App., *infra*, at 25a.

Petitioners raised a federal question and the issue of federal ownership and/or superior control over the water being taken by Petitioners directly from water impounded on federal land or flowing

across federal land, with the trial court. App.. *infra*, at 41a-42a, and 45a-47a. Petitioners' state court petition was dismissed by the district court. App., *infra*, at 20a-21a. Petitioners appealed the order of dismissal. The Court of Civil Appeals of Oklahoma (COCA) addressed Petitioners' federal question arguments relative to the issue of federal ownership and control over the waters of the Grand River. App., *infra*, at 6a-13a. The COCA opinion (App., *infra*, at 1a) framed the issue as "[T]he dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts." App., *infra*, at 4a. COCA decided this dispositive issue by stating " . . . [t]he fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, *belongs to the State of Oklahoma* and has been transferred to the GRDA. The Water Districts therefore fail to establish that the United States has the right to sell the water at issue." App., *infra*, at 13a-14a (emphasis added). In their Petition for Certiorari filed with the Oklahoma Supreme Court (App., *infra*, at 53a.), Petitioners contended state ownership of stream water and groundwater was directly contrary to *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982). App., *infra*, at 62a-63a. Petitioners asserted in their state Petition for Certiorari that COCA had decided a federal question in a way that was not in accord with applicable decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals, citing *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982) and *Tarrant Regional Water Dist. v.*

Sevenoaks, 545 F.3d 906, 913 (10th Cir. 2008). App., *infra*, at 54a, 62a-63a, and 65a.

REASONS FOR GRANTING THE WRIT

I. THE STATE OF OKLAHOMA THROUGH ITS AGENCY, THE GRAND RIVER DAM AUTHORITY, HAS DECLARED ITSELF THE OWNER OF THE WATERS OF THE GRAND RIVER CONTRARY TO SETTLED LAW EXPRESSED IN *HUGHES v. OKLAHOMA*, 441 U.S. 322 (1979) AND *SPORHASE v. NEBRASKA, EX REL. DOUGLAS*, 458 U.S. 941 (1982)

The Court of Civil Appeals of Oklahoma (COCA) stated "[T]he dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts." App., *infra*, at 4a. COCA held " . . . [t]he fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, *belongs to the State of Oklahoma* and has been transferred to the GRDA. The Water Districts therefore fail to establish that the United States has the right to sell the water at issue." (emphasis added) App., *infra*, at 13a-14a. This conclusion is directly contrary to decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals which have stated that a state does not possess an "ownership interest" in the water resources located within its boundaries. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982)

and *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008).

COCA has confused the State's police power to regulate the use of nonnavigable waters within the State with an ownership interest in the water. Ownership would allow the State the power to prohibit removal of such water from the state and sell the water. COCA cited to *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (App., *infra*, at 7a) for the proposition that a state "owns" the superior right to nonnavigable water. Although *Hudson County* does articulate that the public has an interest in the state maintaining the rivers within the state, the case does not stand for the proposition that a state "owns" the water flowing in nonnavigable streams within its boundaries.

Hudson County does not support the theory of state ownership because it is based on the Supreme Court's earlier decision in *Geer v. Connecticut*, 161 U.S. 519 (1896). "*Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them." *Sporhase*, 458 U.S. at 950 (1982).

Hughes v. Oklahoma, 441 U.S. 322 (1979) expressly overruled *Geer*. The *Hughes* Court "traced the demise of the public ownership theory and definitively recast it as 'but a fiction expressive in legal shorthand

of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" *Sporhase*, 458 U.S. at 951 (1982).

In *Hughes*, the owner of a commercial minnow business in Texas was arrested for transporting natural minnows seined from the waters of Oklahoma to Texas for resale in violation of an Oklahoma statute. *Hughes*, 441 U.S. at 323-24. Hughes challenged the statute as unconstitutional because it was repugnant to the Commerce Clause. *Id.* at 324. The Petitioners here challenge the COCA judgment and its interpretation of 82 O.S. § 862 as also being repugnant to the Commerce Clause.

In reversing the decision of the Oklahoma Court of Criminal Appeals this Court expressly overruled *Geer* and extinguished the concept of sovereign ownership or common ownership over natural resources such as wild game. This Court noted: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." *Hughes*, 441 U.S. at 327.

Hughes noted that the view of the *Geer* dissenters became the predominant view in subsequent cases. *Id.* at 329. For example, in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court rejected the argument that Virginia's "ownership" of fish swimming in its territorial waters empowered the state to forbid fishing by federally licensed ships owned by

nonresidents while permitting residents to fish. In reaching this conclusion, this Court explicitly embraced the analysis of the *Geer* dissenters stating:

> "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. . . . *Geer v. Connecticut*, 161 U.S. 519, 539-540, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) (i.e., Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"

Hughes, 441 U.S. at 334-35.

Pursuant to this authority, neither Oklahoma nor GRDA owns the water flowing within the Grand River nor its tributaries (nor groundwater) until such water has been reduced to physical possession by Oklahoma or GRDA. Here, four of the Petitioners take water impounded by the Fort Gibson Dam and standing on federal land. One Petitioner takes water from a flowing tributary of the Grand River and one Petitioner takes groundwater. GRDA has not reduced

to its possession any of the water taken by the Petitioners.

This Court revisited the state "ownership" theory in the context of groundwater in *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 950 (1982). *Sporhase* involved an appeal from the Supreme Court of Nebraska relating to a Nebraska statute that imposed a reciprocity requirement on groundwater that was intended to be transported from Nebraska to another state. *Id.* at 941. The Nebraska Supreme Court found groundwater not to be an article of commerce relying on *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). (COCA relied on *Hudson* for the proposition that Oklahoma owns the waters within its boundaries. App., *infra*, at 7a.) This Court rejected the Nebraska Supreme Court's conclusion that groundwater was not an article of commerce based on its prior decisions that state ownership was "but a fiction expressive in legal shorthand of the importance that a state have power to preserve and regulate the exploitation of an important resource." *Sporhase*, 458 U.S. at 951.

Following these decisions, the issue of Oklahoma's claim to ownership of waters within the state arose again in *Tarrant Regional Water Dist. v. Herrmann*, 2007 WL 3226812 (W.D.Okla. 2007). In *Tarrant*, a Texas water district brought suit against members of the Oklahoma Water Resources Board (OWRB) seeking a declaration that certain laws limiting the export of water out of the state of Oklahoma were invalid because they were preempted

by the Red River Compact and violated the Commerce Clause of the United States Constitution. *Id.* at *1.

The OWRB moved to dismiss. The district court denied the motion holding that although Oklahoma has a special interest in managing the state's water resources, that interest is not properly grounded in a concept of state ownership of the water. *Id.* at *6.

On appeal, the OWRB argued that invalidating the anti-export laws of Oklahoma would encroach on Oklahoma's ownership interests in its natural resources. *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008). Rejecting this argument, the Tenth Circuit held: "It is also well-established that Oklahoma does not enjoy an 'ownership interest' in water resources located in the state. *See Sporhase v. Nebraska,* 458 U.S. 941, 950-52, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982)." *Tarrant Regional Water Dist.*, 545 F.3d at 913.

Here, COCA concluded that " . . . the fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir [situated on the land owned by the Army Corps of Engineers], belongs to the State of Oklahoma and has been transferred to GRDA." App., *infra*, at 13a. This conclusion conflicts with the decisions of this Court and the Tenth Circuit Court of Appeals. Oklahoma does not own the water within its boundaries which it has failed to reduce to its possession. It lacks the power to sell water it does not own. Moreover, Oklahoma lacks the power to sell water which the Petitioners have reduced to their possession or which stands on or

beneath the land of others (e.g., United States). Because the decision of COCA is in direct conflict with settled law expressed by this Court, the COCA decision must be reviewed and reversed.

II. OKLAHOMA'S CLAIM TO OWNERSHIP OF GROUNDWATER IS IN CONFLICT WITH SETTLED LAW EXPRESSED IN *SPORHASE v. NEBRASKA, EX REL. DOUGLAS*, 458 U.S. 941 (1982)

COCA acknowledged that Petitioner Peggs Water Company appropriates groundwater from a well located on its property. App., *infra*, at 5a. Although not directly addressing the issue, COCA appears to have concluded that GRDA owns and therefore can sell groundwater regardless of who owns the land. COCA stated "[A]ll of the water taken by the Water Districts comes from within the conservation and reclamation district (the Grand River water district) established by the State of Oklahoma to preserve, protect and distribute the waters of the Grand River." App., *infra*, at 5a. COCA's apparent conclusion that groundwater is owned by the state/GRDA is contrary to the teachings of *Sporhase*.

CONCLUSION

"Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable

of private ownership is inconceivable." *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913). Though the water here flows within a nonnavigable stream, over land owned at least in part by the United States, ownership by GRDA (or Oklahoma) of such water, not having been reduced to possession by them through physical capture and control, remains inconceivable. COCA's finding of ownership in GRDA and its interpretation of 82 O.S. § 862 is repugnant to the Commerce Clause, Article I, § 8, cl. 3 of the United States Constitution. The COCA decision and 82 O.S. § 862 now serve as a springboard for Oklahoma to exercise a state ownership right over water resources which this Court has held does not exist.

For the reasons expressed above, Petitioners respectfully move this Court to issue its Writ of Certiorari to review the Opinion and Judgment of the Court of Civil Appeals of the State of Oklahoma, entered herein on May 7, 2010 and the Judgment of the Oklahoma Supreme Court entered September 20, 2010 denying Petitioners' state Petition for Certiorari.

Respectfully submitted,

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APPENDIX 1

THIS OPINION HAS BEEN RELEASED
FOR PUBLICATION BY ORDER OF
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION II

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY and TRI-B NURSERY, INC.,	)	Case No. 107,078
Plaintiffs/Appellants,	)	(Filed May 7, 2010)
vs.	)	
GRAND RIVER DAM AUTHORITY,	)	
Defendant/Appellee.	)	

APPEAL FROM THE DISTRICT COURT
OF CRAIG COUNTY, OKLAHOMA

HONORABLE TERRY H. MCBRIDE, TRIAL JUDGE

AFFIRMED

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C. Matthew Bickell
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OPINION BY JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company and Tri-B Nursery, Inc., (Water Districts), appeal from an order of the district court dismissing their First Amended Petition. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2008, ch. 15, app. 1, and the matter stands submitted without appellate briefing. Based on our review of the record and applicable law, we affirm.

BACKGROUND

¶2 Each of the Water District plaintiffs is required to pay the Grand River Dam Authority for water. The Water Districts filed suit alleging that the GRDA does not have any rights to the water for which they are

being charged. The GRDA moved to dismiss pursuant to 12 O.S. Supp. 2004 § 2012(B)(6), arguing that the Water Districts' petition failed to state a claim on which relief could be granted.[1] The district court's order granting the GRDA's motion to dismiss is the subject of the Water Districts' appeal.

STANDARD OF REVIEW

¶3 Appellate review of GRDA's motion to dismiss is governed by the standard set forth in *National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*, 1997 OK 36, ¶ 9, 946 P.2d 662, 665-66:

> A motion to dismiss for failure to state a claim upon which relief can be granted may not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the stated claim for relief.

Id. at ¶ 9, 946 P.2d at 665 (footnotes omitted). Where, as here, evidentiary materials are attached to a section 2012(B)(6) motion or response, a court must convert the motion into one for summary judgment. *Id.*, 946 P.2d at 365-66.

> A motion for summary disposition submits the controversy to the court for application of

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[1] The GRDA also asserted 12 O.S. Supp. 2004 § 2012(b)(7), failure to join an indispensable party, as a basis for its motion. That issue is not pertinent to our disposition of this appeal.

> the pertinent law to uncontroverted facts. The tendered evidentiary materials will warrant summary relief if all material facts are undisputed and supportive of but a single inference that favors the movant.

Id., 946 P.2d at 666. A district court's order granting a motion for summary judgment resolves only a question of law. *Id.* at n.18, 946 P.2d at 666 n.18. Accordingly, we will review *de novo* the district court's order, dismissing this case for failure to state a claim on which could be granted. *Id.* at ¶ 9, 946 P.2d at 666. *See also Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053.

ANALYSIS

¶4 The dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts. If the GRDA owns the right to sell the water at issue, then the Water Districts cannot state any cognizable legal theory to support their claim, and the district court properly dismissed their petition.

¶5 The material facts in this case are not in dispute. The four water districts were organized pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act, 82 O.S. 2001 §§ 1324.1-1324.35. Peggs Water Company and Tri-B Nursery, Inc., are Oklahoma corporations. The four rural water districts and Tri-B Nursery appropriate water from

Fort Gibson Reservoir or its tributaries. Peggs appropriates sub-surface water from a well located on its property. All of the water taken by the Water Districts comes from within the conservation and reclamation district (the Grand River water district) established by the State of Oklahoma to preserve, protect and distribute the waters of the Grand River. The Grand River is a non-navigable water. The Arkansas river, into which the Grand River flows, is a navigable stream.

The GRDA was created in 1935.

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority", hereinafter called the district, and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers. Such district shall be, and is hereby declared to be, a governmental agency of the State of Oklahoma, body politic and corporate, with powers of government and with the authority to exercise the rights, privileges and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes and reclamation and irrigation of arid,

> semiarid and other lands needing irrigation, and the conservation and development of the forests, minerals, land, water and other resources and the conservation and development of hydroelectric power and other electrical energy, from whatever source derived, of the State of Oklahoma.

82 O.S.2001 § 861. The GRDA is authorized to "control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district." 82 O.S.2001 § 862(a). Nonetheless, the Water Districts argue that the GRDA does not "control, store and preserve" the water they are being sold. That argument is alternatively based on an interpretation of a United States Supreme Court decision and interpretation of Oklahoma statutes.

I. The Federal Law Argument

¶6 The right to water consists of two basic but not mutually exclusive interests. One is public and the other private. As to the public interest, the general rule is that the United States owns the superior right to navigable water. *See e.g., U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62, 33 S. Ct. 667, 671 (1913), in which the Supreme Court held that title to real property:

> is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of

> no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress.

Generally, states own the superior right to non-navigable water.

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 356, 28 S. Ct. 529, 531 (1908).

¶7 The private interest consists of two rights, riparian and appropriative. *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶¶ 14 and 23, 855 P.2d 568, 575-77.[2] And, although these private

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[2] *Cf.*, Oklahoma's Waters and Water Rights Act: "It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system

(Continued on following page)

interests are balanced by "relative reasonableness," *id.* at ¶ 27, 855 P.2d at 578, Oklahoma's "power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes." *Oklahoma Water Res. Bd. v. Cent. Okla. Master Conservancy Dist.*, 1968 OK 73, ¶ 14, 464 P.2d 748, 753. Further, "[t]he Legislature may exercise its police power to protect the state's water irrespective of the rights of private owners of the land most immediately concerned." *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 23, 148 P.3d 842, 849-50. Pursuant to this plenary power, the Oklahoma Legislature clearly granted to the GRDA the right to "control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries." 82 O.S.2001 § 862(a). The Water Districts, however, do not claim a superior riparian or appropriative right. They argue that the United States Supreme Court determined in 1960 that the GRDA does not own any rights to the Fort Gibson portion of the Grand River

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of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands." 82 O.S.2001 § 105.1A.

water district, the source of the water they appropriate from the Grand River water district.

¶8 In 1956, the GRDA sued the United States over the right to generate electric power from the Fort Gibson reservoir. The GRDA had recovered compensation when Fort Gibson dam was built for a 70-acre tract of land condemned, for the flow of the Grand River over that land, and for the costs of relocating its electric power transmission lines. The GRDA also claimed it had been deprived of its exclusive power to generate hydroelectric power within the Grand River water district. The Court of Claims found that the Government was liable for taking the GRDA's water power rights, and the Government appealed. The decision on which the Water Districts rely, *United States v. Grand River Dam Auth.*, 363 U.S. 229, 80 S. Ct. 1134 (1960), resolved the litigation. The GRDA argued that, although the federal government had the right to navigable waters, the Grand River was a non-navigable stream over which the State of Oklahoma had control. It was not disputed that Oklahoma had conferred its right to the water within the Grand River water, district, as well as the franchise right to generate electric power from that water, to the GRDA. The GRDA operates electric generating facilities at the Pensacola and Markham Ferry dams, and claimed the right to do so at Fort Gibson, the most downstream of the three dams on the Grand River. Therefore, the GRDA claimed that the federal government's operation of the electric generating facility

at Fort Gibson constituted a "taking" for which the GRDA was entitled to be compensated.

¶9 The three dam projects on the Grand River had been incorporated into the Flood Control Act by Congress in 1941. Fort Gibson was completed as "an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of power on the Arkansas and its tributaries." *Id.* at 230, 80 S. Ct. at 1135. Although recognizing state ownership of non-navigable waters, the Supreme Court found "no constitutional reason why Congress cannot, under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries." *Id.* at 232, 80 S. Ct. at 1136. Pursuant to the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, the Court found this interest "superior" to any state interest. Relying on *Omnia Commercial Co. v. United States,* 261 U.S. 502, 43 S. Ct. 437 (1923), for the proposition that many laws and rulings by the federal government reduce the value of property held by individuals, the Court held that the "Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power." *Grand River Dam*, 363 U.S. at 236, 80 S. Ct. at 1138.

¶10 This case does not hold, as the Water Districts argue, that the GRDA failed to prove that it had any right to the water in the Fort Gibson reservoir. In fact, the Supreme Court specifically refused to reach the issue argued by the United States: the federal

government's right to navigable water preempts state created property rights to non-navigable water. The case merely holds that the right of the GRDA to produce electricity from the Fort Gibson reservoir was inferior to the right of the federal government to do so.

¶11 As previously discussed, many and often competing interests may have legitimate claims to the same water. The fact that one interest may be superior to another does not extinguish the inferior interest; it merely establishes the priority of the superior use. Further, "the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, [or] of the uses of water within the state. . . ." *Sporhase v. Nebraska,* 458 U.S. 941, 954, 102 S. Ct. 3456, 3463 (1982) (invalidating a state statute restricting the use of groundwater outside the state). Mutual, complimentary use of water is contemplated by Oklahoma law. *Franco-American,* 1990 OK 44 at ¶ 14, 855 P.2d at 575-76. It is also contemplated by federal law. In *Pennsylvania v. Wheeling & Belmont Bridge* Co., 59 U.S (18 How.) 421 (1855), the Supreme Court held that a bridge over the Ohio river, constructed pursuant to a Virginia statute, created an obstruction to navigation that should be removed. Before the decree was executed, Congress declared the bridge a lawful structure and the Court refused to order removal of the bridge.

> Although it still may be an obstruction in fact, [it] is not so in contemplation of law. We have already said, and the principle is undoubted,

> that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and Federal, which, if not sufficient, certainly none can be found in our system of government.

Id. at 430. Consequently, the ruling in *United States v. Grand River Dam Authority* cannot be extended to support the Water Districts' position that the government's right to build a flood control dam and produce electricity at Fort Gibson precludes any other complimentary use of the water by the GRDA, or preempts all other rights previously granted the GRDA by the State of Oklahoma to the water in the Fort Gibson reservoir, its streams, tributaries and associated groundwater.

¶12 Finally, the Water Districts' reliance on 82 O.S.2001 § 105.21 does not advance their argument. That statute provides, in part:

> The owner of any works for the storage, diversion or carriage of water, which contain water in excess of his needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage or

> carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. . . .

¶13 The Water Districts argue that section 105.21 conveys to the United States ownership of, or at least the right to sell, water in the Fort Gibson reservoir, because the federal government owns the Fort Gibson dam. No other authority is cited for this proposition and no reported case has interpreted this statute. Nonetheless, the Water Districts' construction is irreconcilable with other provisions in the Waters and Water Rights Act. Section 105.9 requires that any "federal governmental agency . . . intending to acquire the right to the beneficial use of any water shall . . . before taking the same from any constructed works, make an application to the Board. . . ." Section 105.29 requires officers of the United States "authorized by law to construct works for the utilization of waters within the state" to notify the Water Resources Board of their intent to utilize specified water within the State. The Board may approve, reduce or reject the United States' intended utilization. The fact that the United States has the right to build a dam for flood control and hydroelectric generating purposes does not establish the federal government's ownership of the water affected. As previously discussed, the fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, belongs to the State of Oklahoma and has been transferred to the GRDA. The Water

Districts therefore fail to establish that the United States has the right to sell the water at issue.

II. The State Law Argument

¶14 The Water Districts' State law argument relies on two statutes. The first, 82 O.S.2001 § 887, provides: "[T]he waters of Grand River in Oklahoma and the Pensacola and Markham Ferry Reservoirs, located thereon, be and are hereby determined and declared to be non-navigable and waters of the State of Oklahoma." Because this statute was enacted in 1963, thirteen years after the construction of the Fort Gibson dam, the Water Districts conclude that the Legislature, by its omission of any reference to the Fort Gibson reservoir, intended to exclude waters below the Markham Ferry dam from the authority of the GRDA. The second statute, 82 O.S.2001 § 890, provides: "The Grand River Dam Authority shall have no control over that portion of the Grand River downstream from Fort Gibson Dam to the point of confluence of the waters of the Grand River with those of the Arkansas River." With the specific exclusion of water between the Fort Gibson dam and the Arkansas river, the Water Districts conclude that the Legislature also intended to exclude the water from which the excluded waters were derived, in their view, the Fort Gibson reservoir.

¶15 Other than these statutory citations, the Water Districts cite no authority to support their construction of these statutes. Nonetheless, principles of statutory construction are generally accepted.

> The determination of legislative intent controls statutory interpretation. The intent is ascertained from the whole act based on its general purpose and objective. In construing statutes, relevant provisions must be considered together whenever possible to give full force and effect to each. To ascertain intent, we look to the language of the pertinent statute. We presume that the Legislature intends what it expresses. Except when a contrary intention plainly appears, terms are given their plain and ordinary meaning.

Oklahoma Ass'n For Equitable Taxation v. City of Oklahoma City, 1995 OK 62, ¶ 5, 901 P.2d 800, 803 (footnotes omitted). With respect to the Water Districts' section 887 argument, it is true, as a general rule, that the failure to include an item evidences an intent to omit the item. "[T]he general rule is that nothing may be read into a statute which was not within the manifest intention of the legislature as gathered from the language of the act" *Stemmons, Inc. v. Universal C.I.T. Credit Corp.,* 1956 OK 221 ¶ 19, 301 P.2d 212, 216. *See also McSorley v. Hertz Corp.,* 1994 OK 120, ¶ 19, 885 P.2d 1343, 1346 (legislative omission is evidence of intent not to cover the omitted subject). Nonetheless, "[w]hen construing statutes, all relevant provisions must be considered together, where possible, so that force and meaning is

given to each." *Dana P. v. State,* 1982 OK 140, ¶ 23, 656 P.2d 253, 258. Further, "in the construction of statutes to determine legislative intent, the entire act may be considered, together with all other enactments on the same subject, and when the intention of the Legislature can be gathered from the entire statute, words may be modified, altered, or supplied to give the statute the force and effect intended." *Charlson v. State ex rel. Dep't of Pub. Safety,* 2005 OK 83, ¶ 10, 125 P.3d 672, 675.

¶16 First, the Water Districts' construction of section 890 is inconsistent with its interpretation of section 887. The water flowing out of Fort Gibson reservoir and excluded from GRDA authority pursuant to section 890 flowed into that reservoir from waters included within the Grand River water district, and waters that the Water Districts concede are specifically included within the GRDA's authority pursuant to section 887. Although the authority of the GRDA over water below the Fort Gibson dam may be limited, the non-navigable nature of that water does not change until it reaches the Arkansas River.

¶17 Second, the Water Districts' construction of section 887 is unacceptably narrow. The designation of particular waters, the Pensacola and Markham Ferry reservoirs, as non-navigable does not require the conclusion that all reservoirs not designated are navigable. This is particularly true when the statute begins with the designation of the Grand River as non-navigable. The State's ownership depends on the

non-navigable nature of the water, not the State's articulation of that fact.

¶18 Third, the Water Districts' construction of section 887 fails to reconcile the authority granted to the GRDA pursuant to sections 861 and 862:

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority" . . . consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers.

Within that district, the GRDA has the right to "the control, storing, preservation and distribution of the waters of the Grand River and its tributaries." 82 O.S.2001 § 861. It is undisputed that the Fort Gibson reservoir is within the Grand River conservation and reclamation district. The statute creating the GRDA and defining its functions is "an express appropriation by the state of the waters in Grand River to be applied to the uses therein stated, and to place in its said agency exclusive authority to develop the stream in the manner therein provided." *Grand-Hydro v. Grand River Dam Auth.*, 1943 OK 158, ¶ 18, 139 P.2d 798, 801. There is only one exception to the authority granted the GRDA to control the waters of the Grand River; "any municipal corporation within the area

included within the jurisdiction of the said Grand River Dam Authority shall be entitled to take water from the Grand River and any of its tributaries in any quantities that may be needed by such municipal corporation." 82 O.S. Supp. 2008 § 862(a). None of the Water Districts is a municipal corporation, and we will not "read into" the statute an exception the Legislature did not create.

¶19 Finally, the GRDA has been charging, and the Water Districts have been paying the GRDA, for the water at issue for a substantial period of time even before the Water Districts began their legal challenges to the GRDA's right to do so.

> It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. The courts are especially reluctant to overturn a long standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule, or where parties who have contracted with the government upon the faith of such construction will be prejudiced.

Oral Roberts Univ. v. Oklahoma Tax Comm'n, 1985 OK 97, ¶ 10, 714 P.2d 1013, 1015 (quoting *McCain v. State Election Bd.,* 1930 OK 323, ¶ 16, 289 P. 759,

762-63). We find no reason to overturn the GRDA's construction of these statutes.

CONCLUSION

¶20 The GRDA was created by the State of Oklahoma and vested with the right to control, store, preserve and distribute the waters of the Grand River and its tributaries. Included among those rights is the right to sell water to the Water Districts. No superior right held by the United States affects or supersedes the right of the GRDA to do so. Consequently, the Water Districts can state no claim entitling them to relief based on the facts alleged in their First Amended Petition. The Order of the district court dismissing that petition is affirmed.

¶21 **AFFIRMED.**

WISEMAN, C.J., and BARNES, J., concur.

May 7, 2010

APPENDIX 2

IN THE DISTRICT COURT OF CRAIG COUNTY
STATE OF OKLAHOMA

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO.7, WAGONER COUNTY RURAL WATER DISTRICT NO.9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY, and TRI-B NURSERY, INC.	)	Case No. CJ-08-43
Plaintiff	)	
VS.	)	
GRAND RIVER DAM AUTHORITY,	)	
Defendant.	)	

ORDER DISMISSING CASE

Now on this 13th day of April, 2009, the Court having carefully reviewed the files and records in the case, and having reviewed the Motion Dismiss Plaintiff's First Amended Petition filed by the Defendant in the above entitled and numbered case and Plaintiff's Response thereto, as well as all the pleadings in the case, and having carefully reviewed the evidentiary materials, briefs and arguments submitted by all parties in support of their respective claims, FINDS:

1. That Title 82, Okla. Stat., Section 861, grants the Defendant the right to control, store, and preserve, as well as distribute the waters of the Grand River in the County(s) of the Plaintiff.

2. That there is no exception for the situation presented herein by the Plaintiff that the Defendant must be the entity that impounds and maintains the reservoir known as Fort Gibson Lake in order to carry on the activities outlined in Section 861.

3. The Governmental entity that impounded and maintains Fort Gibson Lake may or may not have the right to supersede the Defendant in certain activities but has not taken any action that would interfere with the activities complained of in Plaintiff's Petitions.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Motion Dismiss by the Plaintiff is granted for failure to state a claim upon which relief could be granted, and the above entitled and numbered cause is hereby DISMISSED.

/s/ Terry H. McBride
Hon. Terry H. McBride
District Judge

CERTIFICATE OF MAILING

I, Honorable Terry H. McBride, hereby certify that a true and correct copy of the above and foregoing Order, was mailed on this 13 day of April, 2009, with the proper postage affixed thereon to:

Mr. Steven M. Harris
Mr. C. Matthew Bickell
1350 South Boulder, Suite 700
Tulsa, OK 74119

Mr. James M. Reed
Mr. Michael D. Graves
Mr. T. Richer
Hall, Estill, Hardwick, Gable
Golden & Nelson, P.C.
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708

/s/ Terry H. McBride
Terry H. McBride
District Judge

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MONDAY, SEPTEMBER 20, 2010

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

105,749 In Re the Marriage of
A. Graham Wilson v. A. Wilson
Both petitions for certiorari are denied.
ALL JUSTICES CONCUR

106,381 Janet Karner, individually and as surviving spouse of Kenneth Karner, deceased, et al v. Steven Redd, et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

107,035 L.G. Sam Davis v. Eddie P. Mayberry, et al and Donald R. And Sharon Y. Mayberry, husband and wife and Soloman Lee, Jr., et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

107,078 Wagoner County Rural Water District No. 2, et al v. Grand River Dam Authority
Petition for certiorari is denied.
ALL JUSTICES CONCUR

107,141 High Sierra Energy, L.P., a Delaware Limited Partnership v. David R. Hull, an individual, et al
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Hargrave, Kauger, Winchester, Colbert, Reif, JJ.
DISSENT: Taylor, V.C.J., Opala, Watt, JJ.

107,671 Jason D. Williams v. Board of Oklahoma Polygraph Examiners
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Taylor, V.C.J., Hargrave, Opala, Kauger, Watt, Winchester, Colbert, JJ.
DISSENT: Reif, J.

107,822 Thomas R. Nelson v. Robert Ricketson, M.D., et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

/s/ J. E. Edmondson
CHIEF JUSTICE

APPENDIX 4

82 Okl.St.Ann. § 862

Oklahoma Statutes

Title 82. Waters and Water Rights

Chapter 8. Grand River Dam Authority

§ 862. Powers, rights and privileges of district

The district shall have and is hereby authorized to exercise the following powers, rights and privileges:

(a) To control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district; provided, however, that any municipal corporation within the area included within the jurisdiction of the said Grand River Dam Authority shall be entitled to take water from the Grand River and any of its tributaries in any quantities that may be needed by such municipal corporation;

(b) To develop and generate water power, electric power and electric energy, from whatever source, within the boundaries of the district; to acquire coal or other minerals to be used for the purposes of providing energy sources for electrical generating plants; to acquire or lease any and all railroad connections, equipment, rolling stock, trackage and otherwise, necessary to the transporting of coal and other minerals to generating plant sites within the district; and to buy, sell, resell, interchange and

distribute electric power and energy in order to carry forward the business and functions of the district now or hereafter authorized by law and may enter into contracts for such purposes, such contracts to run for a period of not to exceed fifty (50) years except those contracts provided for in paragraphs (f) and (g) of this section. All contracts may contain such reasonable provisions, limitations, qualifications, protective clauses and rights and obligations of purchase and sale, and such provisions for the dedication of the use of facilities and the construction of additional facilities to serve the load requirements of all the parties as may be deemed advisable by the district to safeguard the business and properties of all the parties to such contracts, all within the limits of sound business judgment and practice, good conscience, and not contrary to the public policy of the state;

(c) To prevent or aid in the prevention of damage to person or property from the waters of the Grand River and its tributaries;

(d) To forest and reforest and to aid in the foresting and reforesting of the watershed area of the Grand River and its tributaries and to prevent and to aid in the prevention of soil erosion and floods within said watershed area;

(e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate or to contract for the maintenance, use and operation of any and all property of any kind, real, personal, or mixed, or any interest therein, including trucks of

any size or weight and passenger vehicles and to own, construct, operate and maintain any project or works in conjunction or jointly with, as tenants in common, any public or private corporation duly authorized and qualified to do business within this state including, but not limited to, rural electric cooperatives of the State of Oklahoma or the United States of America, or any department, subdivision or agency of the State of Oklahoma or the United States of America, or with any "public agency" as defined under the Interlocal Cooperation Act, Sections 1001 through 1008 of Title 74 of the Oklahoma Statutes, within or without the boundaries of the district, necessary, incidental or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this act;[1]

(f) In addition to any other powers conferred, the district shall have power and authority to participate and enter into agreements with any public or private corporation duly authorized and qualified to do business within the State of Oklahoma including, but not limited to, rural electric cooperatives, the state or the United States of America or any department, subdivision or agency of the state or the United States of America, or with any "public agency" as defined under the Interlocal Cooperation Act, Sections 1001 through 1008 of Title 74 of the Oklahoma Statutes, for the purpose of planning, acquiring, financing, owning, operating and maintaining an

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[1] Title 82, § 861 et seq.

undivided ownership of any steam, oil, gas, coal-fired, thermal, geothermal, solar, waste or refuse reclamation powered electric generating plant or plants or any facilities of every kind necessary, incidental or convenient for the production, generation and transmission of electric power and energy including, but not limited to, any and all related transmission facilities, which shall be used as common facilities. The agreements shall provide that the district and any participants therein shall have the incidents of tenant in common to any plant or facility. It shall also be provided in the agreements that the district and any participant in the project shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction thereof and shall own and control a like percentage of the electrical output thereof.

Each participant shall defray its own interest payments and other payments required to be made or deposited in connection with any financing undertaken by it to pay its percentage of the money furnished or value of property supplied by it for the planning, acquisition and construction of any common facility, or any additions or betterments thereto. The agreement shall further provide a uniform method of determining and allocating operation and maintenance expenses of the common facility.

In carrying out the powers granted in this section, the district and each participant shall be severally liable only for its own acts and not jointly or severally liable

for the acts, omissions or obligations of others. No money or property supplied by the district or any participant for the planning, financing, acquiring, constructing, operating or maintaining of any common plant or facility shall be credited or otherwise applied to the account of any other participant therein, nor shall the undivided share of the district or any participant therein be charged, directly or indirectly, with any debt or obligation of any other participant or be subject to any lien as a result thereof. No action in connection with a common facility shall be binding upon the district except as expressly authorized and provided for in the participation agreement;

(g) In addition to the powers conferred in paragraph (f) of this section, the district shall have power and authority to participate and enter into agreements with any public or private corporation duly authorized and qualified to do business within this state including, but not limited to, rural electric cooperatives, the State of Oklahoma or the United States of America or any department, subdivision or agency of the State of Oklahoma or the United States of America, or with any "public agency" as defined under the Interlocal Cooperation Act, Sections 1001 through 1008 of Title 74 of the Oklahoma Statutes, for the purpose of planning, acquiring, financing, owning, operating and maintaining undivided ownership interests in any steam, oil, gas, coal-fired, thermal, geothermal, solar, waste or refuse reclamation powered electric generating plant or plants or any other facilities of every kind necessary, incidental or

convenient for the production, generation and transmission of electric power and energy including, but not limited to, any and all related transmission or other facilities which are to be used as common facilities and to cooperate with other state agencies and public trusts to promote economic development in the state and to assist in attracting industry to the state. Such undivided ownership interests may be created by an agreement entered into with respect to property to be acquired by the district. Any such agreement may be a sale agreement, with the purchase price payable at one time or in installments at such time and over such period as shall be agreed to by the parties thereto, a lease agreement, with a nominal purchase option, or any other type of agreement. In addition to the purchase price, the district shall be fully indemnified as to operation, maintenance, administrative and other expenses incurred with respect to such undivided interest. Any payment received in respect to any such agreement shall be deemed revenues of the Authority. The district is hereby authorized to enter into any such agreement in order to sell, lease or otherwise convey undivided ownership interests in any such property. Any such agreement shall specify the undivided interest to be owned or acquired by each of the participants, provide for a waiver of partition, prescribe the time of vesting of such interest and the amount of electrical output to be owned and controlled by any participant.

Each participant shall defray its own interest and other payments required to be made or deposited in

connection with any financing undertaken by it to pay its percentage of the money furnished or value of property supplied by it for the planning, acquisition and construction of any common facility, or any additions or betterments thereto. The agreement shall provide a uniform method of determining and allocating operation and maintenance expenses of the common facility.

In carrying out the powers granted in this section, the district and each participant shall be severally liable only for its own acts and not jointly or severally liable for the acts, omissions or obligations of others. No money or property supplied by the district or any participant for the planning, financing, acquiring, constructing, operating or maintaining of any common plant or facility shall be credited or otherwise applied to the account of any other participant therein, nor shall the undivided share of the district or any participant therein be charged, directly or indirectly, with any debt or obligation of any other participant or be subject to any lien as a result thereof. No action in connection with a common facility shall be binding upon the district except as expressly authorized and provided for in the participation agreement;

(h) To acquire by condemnation any and all property of any kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the district, necessary, incidental or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this act, in the manner

provided by general law with respect to condemnation; provided that nothing in this act shall ever be construed to authorize the district to acquire by condemnation any privately, municipally or publicly owned electric public utility system or any part thereof outside of the high-water mark of a reservoir area or outside a properly located damsite, except the districts may require the relocation of transmission lines and substations so owned where such relocation is necessary for the construction and maintenance of dams, reservoirs, levees, spillways and floodways, and in such event just compensation shall be paid. Provided that the Grand River Dam Authority shall have the right to cross transmission lines of other electric utility companies under proper engineering standards of construction as approved by the Corporation Commission;

(i) Subject to the provisions of this act, from time to time sell, which shall include, but not be limited to, an installment sale agreement, lease with nominal purchase options, or otherwise dispose of any property of any kind, real, personal or mixed, or any interest therein, which shall not be necessary to the carrying on of the business of the district;

(j) To overflow and inundate any public lands and public property and to require the relocation of roads and highways in the manner and to the extent necessary to carry out the purposes of this act; provided, that said district shall be liable in damages to the State of Oklahoma or any subdivision thereof for any

injury occasioned or expense incurred by reason thereof;

(k) To construct, extend, improve, maintain and reconstruct, to cause to be constructed, extended, improved, maintained and reconstructed, and to use and operate any and all facilities of any kind necessary, incidental or convenient to the exercise of such powers, rights, privileges and functions;

(l) To sue and be sued in its corporate name in contracts, reverse condemnation, tort, equity, mandamus and similar actions and in its own name plead and be impleaded, provided, however, that any and all actions of law or in an equity against the district shall be brought in the county in which the principal office of the district shall be located or in the county where the cause of action arose;

(m) To adopt, use and alter a corporate seal;

(n) To make bylaws for the management and regulation of its affairs;

(o) To appoint officers, agents and employees, to prescribe their duties and to fix their compensation; and enter into contracts with labor unions, provided, that contracts with labor unions shall not abrogate the rights of the district to cooperate and carry out Veterans on the Job Training;

(p) To make contracts and to execute instruments necessary, incidental or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this act;

(q) To borrow money for its corporate purposes and, without limitation of the generality of the foregoing, to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to make and issue its negotiable bonds for money borrowed, in the manner provided in this act. Nothing in this act shall authorize the issuance of any bonds, notes or other evidences of indebtedness of the district, except as specifically provided in this act;

(r) To prescribe and enforce rules for the use for recreational and commercial purposes of the lakes created by the district by impounding the waters of said lakes, and the shorelands of the district bordering thereon, including the use of firearms, the inspection of all boats of every character proposing to operate or operating on said lakes, the issuance of permits for the operation of boats, surfboards, aquaplanes, sea-skis or similar devices on said lakes for hire; the charging and collection of fees for the inspection or operation of such boats, surfboards, aquaplanes, sea-skis or other similar devices on said lakes for hire; preventing the launching or operation of any commercial or for-hire boat, surfboard, aquaplane, sea-ski or similar device for hire, on the waters of said lakes, without a certificate of inspection and a permit for such use; prescribing the type, style, location and equipment of all wharves, docks and

anchorages along the shores and upon the water of said lakes; the issuance of permits for wharfage, dock or anchorage privileges and charging fees for such commercial or private permits; and the establishment and maintenance of public wharves, docks or anchorages and the charging and collection of fees for the use thereof by the public; to appoint or employ such persons as the district may deem proper and suitable for the purpose of enforcing such rules and regulations as may be issued hereunder, or as may be issued pursuant to the provisions of Sections 4200 et seq. of Title 63 of the Oklahoma Statutes, and for the enforcing of the provisions of this act, and all violations of criminal laws occurring within the boundaries of the counties where real property owned or leased by the Grand River Dam Authority is located, which employees shall have the power of peace officers during the performance of those duties, except in the serving or execution of civil process;

(s) To do any and all other acts or things necessary, incidental or convenient to the exercise of the powers, rights, privileges or functions conferred upon it by this act or any other act or law. Provided said district shall be liable for damage caused by said district, its agents, servants and employees in creating, constructing, maintaining or operating said district to any corporation, partnership, person or individual whose property, either real or personal, within or without said district, has been damaged and said damages may be determined by appropriate action as provided by law. Nothing in this act shall

be construed as rendering the district liable for damage where it is not liable on general principles of law or statute or Constitutional provision.

Provided, however, that in the course of exercising its powers as herein enumerated, the said district shall at all times consider the rights and needs of the people living within and upon the land lying within the watershed of the rivers or streams developed by the district; provided, however, that nothing herein shall prevent the district from selling for irrigation purposes within the boundaries of the district any water impounded by it under authority of law, provided that nothing herein contained shall authorize the state to engage in agriculture except for educational and scientific purposes and for the support of its penal, charitable, and educational institutions; and

(t) To support and assist the efforts of state, regional and local development organizations, political subdivisions, industrial committees, chambers of commerce, tourism organizations, agricultural organizations, environmental organizations and other similar public and private agencies to obtain new and foster expansion of existing service, industrial and manufacturing facilities, businesses and enterprises to enhance the quality of life for the citizens of the district and the state. Provided, support and assistance shall be limited to an amount not to exceed a total of Twenty-five Thousand Dollars ($25,000.00) per year for one or more projects or efforts that are for the benefit of or impact the quality of life for each

city or community located within the boundaries of the district.

(u) Notwithstanding any other provision of law, the General Manager, department heads and other essential employees of the district, as designated by the General Manager, may be permitted to use a district owned vehicle to provide transportation between the employee's residence and the assigned place of employment and between the residence and any location other than the assigned place of employment to which the employee travels in the performance of the employee's official duty.

APPENDIX 5

IN THE DISTRICT COURT IN AND FOR CRAIG COUNTY STATE OF OKLAHOMA

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY and TRI-B NURSERY, INC.,	)	Case No. CJ-08-43
Plaintiffs,	)	
vs.	)	**Jury Trial Demanded**
GRAND RIVER DAM AUTHORITY	)	
Defendant.	)	

FIRST AMENDED PETITION

(Filed Jun. 12, 2008)

COME NOW Plaintiffs, Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company, and Tri-B Nursery, Inc., and for their Petition against the Defendant, allege and state as follows:

PARTIES

1. Plaintiff, Wagoner County Rural Water District No. 2 ("Wagoner 2"), is an Oklahoma rural water district formed pursuant to 82 O.S. §1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

2. Plaintiff, Wagoner County Rural Water District No. 7 ("Wagoner 7"), is an Oklahoma rural water district formed pursuant to 82 O.S. § 1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

3. Plaintiff, Wagoner County Rural Water District No. 9 ("Wagoner 9"), is an Oklahoma rural water district formed pursuant to 82 O.S. §1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

4. Plaintiff, Cherokee County Rural Water District No. 11 ("Cherokee 11"), is an Oklahoma rural water district formed pursuant to 82 O.S. §1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

5. Plaintiff, Peggs Water Company ("Peggs") is a Oklahoma not-for-profit corporation with its principal place of business in Peggs, Oklahoma.

6. Plaintiff, Tri-B Nursery, Inc. is an Oklahoma corporation with its principal place of business in Tahlequah, Oklahoma.

7. Defendant, Grand River Dam Authority ("GRDA") is a conservation and reclamation district and agency of the State of Oklahoma created by the statutes of the State of Oklahoma, 82 O.S. § 861, *et seq.* "for the purpose of utilizing the waters of Grand River and its tributaries." *Grand River Dam authority v. Wyandotte Board of Education,* 147 P.2d 1003, 1004 (Okla. 1943).

JURISDICTION AND VENUE

8. This Court has jurisdiction and venue over this action pursuant to 82 O.S § 862(1).

9. GRDA may be sued in its corporate name pursuant to 82 O.S. § 862(1).

10. None of the claims asserted against GRDA herein are subject to the Oklahoma Governmental Tort Claims Act, 51 O.S. § 151 *et seq.*, under the circumstances of this case.

GENERAL FACTUAL ALLEGATIONS

A. Creation of the Fort Gibson Dam and Reservoir

11. The Fort Gibson Dam is in the Arkansas River Basin on the Grand (Neosho) River. It is located at mile 7.7, Lat. 35°52'11", Long. 95°13'47" in Section 18, T16N, R20E in Cherokee County, Oklahoma approximately 5 miles north of the town of Fort Gibson and about 12 miles northeast of Muskogee.

12. The Fort Gibson Dam was designed and constructed by the United States Army Corps of Engineers ("USACE"). Construction was started in 1942 and was suspended during World War II. Construction of the Dam was completed on September 2, 1953 at a cost of $42,535,000.00.

13. The Fort Gibson Dam was constructed for the purpose of flood control and the generation of hydroelectric power. Its construction was authorized by the Flood Control Act of 1941 and incorporated in the Arkansas River multiple-purpose plan by the River and Harbor Act of 1946.

14. Water enters the Fort Gibson Reservoir from the Grand (Neosho) River, Salt Creek, Spring Creek, Big Hollow Creek, Jane Dennis Creek, Clear Creek, Hickory Creek, Fourteenmile Creek, Double Spring Creek, Ranger Creek, Flat Rock Creek, Brush Creek, Chouteau Creek, Pryor Creek and other streams and tributaries.

15. The largest source of water flowing into the Fort Gibson Reservoir is the Grand (Neosho) River. GRDA owns and controls the Pensacola Dam, Pensacola Project upriver from Fort Gibson Reservoir. GRDA releases water from the Pensacola Reservoir (designated pursuant to 82 O.S. § 861 as the Grand Lake O' the Cherokees) which flows into the Markham Ferry Reservoir (designated pursuant to 82 O.S. § 861 as Lake Hudson). GRDA owns and controls the Robert S. Kerr Dam, Markham Ferry Project and releases water from the Markham Ferry Reservoir. This water then flows into the Fort Gibson Reservoir which is owned and operated by USACE. This same water is released from the Fort Gibson Dam and eventually enters the Arkansas River and leaves the State of Oklahoma.

B. Formation and Powers Purportedly Granted to GRDA

16. In 1935, the Oklahoma Legislature adopted 82 O.S. § 861 creating a conservation and reclamation district to be known as "Grand River Dam Authority" consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers.

17. GRDA was declared to be a governmental agency of the State of Oklahoma, body politic and corporate, with powers of government and with the authority to exercise the rights, privileges and functions specified by 82 O.S. § 861 *et seq.*, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes and reclamation and irrigation of arid, semiarid and other lands needing irrigation, and the conservation and development of the forests, minerals, land, water and other resources and the conservation and development of hydroelectric power and other electrical energy, from whatever source derived, of the State of Oklahoma.

18. Among the rights and powers purportedly granted to GRDA were the powers to control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district.

C. Exercise of Control Over the Water Impounded at the Fort Gibson Reservoir

19. Since the completion of the Fort Gibson Dam and the flooding of land underlying the Fort Gibson Reservoir, GRDA has exercised control over the use of the water impounded at the Fort Gibson Reservoir, in groundwater near the Grand River and in tributaries of the Grand River.

20. The Plaintiffs and individuals or entities desiring to appropriate water from the Fort Gibson Reservoir or from rivers, creeks, streams or other tributaries that flow into the Fort Gibson Reservoir as well as groundwater (subsurface water) have been required to apply to GRDA for permits to take water from these water sources and/or execute contracts with GRDA for the taking and use of raw water.

21. With the exception of Plaintiff, Peggs, each of the Plaintiffs appropriate water from the Fort Gibson Reservoir or from rivers, creeks, streams or tributaries that flow into the Fort Gibson Reservoir. Peggs appropriates water from a water well located on its own property. GRDA requires Peggs to purchase the water taken from Peggs' water well from GRDA.

22. For a number of years, GRDA has charged water appropriators a rate per thousand gallons of water taken from the Fort Gibson Reservoir or its tributaries.

23. In June of 2007, the engineering firm of WDB Engineering, P.L.L.C. conducted a rate study on sales of raw water from the Grand, Hudson and Fort Gibson Reservoirs. Based on this rate study, GRDA announced to water appropriators that it would be increasing its water rates for raw water taken from the Fort Gibson Reservoir and its tributaries.

D. The *United States v. Grand River Dam Authority* Case

24. On June 13, 1960, the Supreme Court of the United States issued its ruling in the case of *United States v. Grand River Dam Authority,* 363 U.S. 229, 80 S.Ct. 1134 (1960).

25. The Supreme Court's Decision originated from claims that GRDA had asserted against the United States in the United States Court of Claims. Specifically, GRDA's claims arose because the United States had condemned a 70 acre tract owned by GRDA when the United States undertook the Fort Gibson project. The United States obtained flowage rights over GRDA's land and made payment for the location of GRDA's transmission lines.

26. GRDA filed suit demanding that the United States pay $10,000,000.00 for the "taking" of its water power rights at Fort Gibson and its franchise to develop electric power and energy at the site.

27. From an adverse judgment by the Court of Claims, the United States appealed to the Supreme Court.

28. On appeal, GRDA argued that it had a vested interest in the waters of the Grand River by virtue of the grant made to it by the State of Oklahoma for the development of hydroelectric power. GRDA argued that the State of Oklahoma had the power and authority to appropriate and vest title to the waters of the Grand River in GRDA because a

deed from the United States to the Cherokee Nation dated December 31, 1838 divested the United States of all its right, title and interest in and to the waters of the Grand River.

29. GRDA also argued that if any water rights in the waters of the Grand River remained in the United States after the grant to the Cherokee Nation in 1838, these rights were later transferred to the State of Oklahoma by virtue of Section 25 of the Act of April 26, 1906 (34 Stat. 137, 146) which granted light and power companies the right to construct dams across non-navigable streams in Cherokee territory for power and other purposes.

30. GRDA contended that it had vested property rights in the waters of the Grand River and that these property rights could not be taken by the United States without just compensation.

31. The Supreme Court disagreed with GRDA's arguments. The Supreme Court found that GRDA could not trace its title to the waters of the Grand River through the grant from the United States to the Cherokee Nation. Specifically, the Supreme Court found that if the title to waters vested in an Indian tribe, Oklahoma took sovereignty over the public lands in the condition of ownership as they existed at the time the State of Oklahoma came into the Union. There was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted the divesting of the title that was granted to the Indian tribe.

32. The Supreme Court also found that Section 25 of the Act of April 26, 1906 (34 Stat. 137, 146) was merely an assertion of power possessed by the Federal Government to regulate Indian Territory; however, no water rights condemned by this Act passed to the State of Oklahoma and from the State of Oklahoma to GRDA.

33. The Supreme Court ultimately concluded that GRDA did not possess any vested property right to the waters of the Grand River. Because GRDA did not possess any vested property right to the waters of the Grand River, no property had been taken by the United States, and GRDA was not entitled to compensation from the United States.

COUNT ONE
DECLARATORY JUDGMENT

34. Plaintiffs incorporate by reference each of the above and foregoing allegations.

35. Plaintiffs seek a declaration that GRDA has no right, title or interest in or to the water impounded at the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries.

36. Plaintiffs further seek a declaration that GRDA has no right to charge for water that it does not control, store or preserve.

37. Plaintiffs further seek a declaration that GRDA has no right to charge Plaintiffs for water appropriated by Plaintiffs from the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries.

COUNT TWO
INJUNCTION

38. Plaintiffs incorporate by reference each of the above and foregoing allegations.

39. GRDA has charged Plaintiffs for water taken from the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir. GRDA has no right, title or property interest in or to the water which it has sold and is continuing to sell (or charge fees for the appropriation of) to the Plaintiffs. Plaintiffs do not have a proper and adequate remedy at law and injunctive relief is a proper remedy to stop GRDA from charging Plaintiffs for the water appropriated and used by the Plaintiffs.

COUNT THREE
UNJUST ENRICHMENT – RESTITUTION

40. Plaintiffs incorporate by reference each of the above and foregoing allegations.

41. GRDA has sold and continues to sell water to the Plaintiffs (and/or charge fees for the appropriation of water) to which GRDA has no right, title or property interest. GRDA has been unjustly enriched by the sale of said water and Plaintiffs are entitled to restitution for all amounts paid to GRDA for said water in an amount in excess of $10,000.00.

PRAYER

Based upon the above and foregoing allegations, Plaintiffs pray for a judgment against the Defendants as follows:

1. A judgment that GRDA has no right, title or interest in or to the water impounded at the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries

2. A judgment that GRDA has no right to charge for water that it does not control, store or preserve.

3. A judgment that GRDA has no right to charge Plaintiffs for water appropriated

by Plaintiffs from the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries.

4. A permanent injunction against GRDA restraining GRDA from charging Plaintiffs for water taken by Plaintiffs from the Fort Gibson Reservoir, from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or from water wells on land near the Fort Gibson Reservoir.

5. A Judgment for the return of any and all funds which the Court deems were obtained by GRDA in contravention of Plaintiffs' rights and for which GRDA has been unjustly enriched.

6. A monetary judgment for all damages sustained as a result of GRDA's wrongful actions.

7. A monetary judgment for all attorney's fees, costs and interest associated with this action.

8. Such further and other relief as may be appropriate.

JURY TRAIL DEMANDED

Plaintiffs hereby demand a Jury Trial on all issues properly triable by Jury.

Respectfully submitted,

DOYLE HARRIS
DAVIS & HAUGHEY

/s/ C. Matthew Bickell

Steven M. Harris,
OBA #3913
C. Matthew Bickell,
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(918) 592-1276
(918) 592-4389 (fax)
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I do hereby certify that on the 11th day of June, 2008, I caused to be mailed a true and correct copy of the above and foregoing instrument to the following parties with proper postage fully prepaid thereon.

James M. Reed
Michael D. Graves
John T. Richer
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708

/s/ C. Matthew Bickell

APPENDIX 6

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY and TRI-B NURSERY, INC., Plaintiffs/Appellants, vs. GRAND RIVER DAM AUTHORITY, Defendant/Appellee.	Case No. 107,078 Acting conformably to provisions of 12 O.S. § 990 A and Rule 1.4, the Clerk notes that this matter appears to have been mailed (date) 5-27-10

PETITION FOR WRIT OF CERTIORARI

(Filed Jun. 1, 2010)

Plaintiffs/Appellants, Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company, and Tri-B Nursery, Inc., petition that a writ of certiorari issue to review the decision of the Court of Civil Appeals of the State of Oklahoma, Division II entered on May 7, 2010, affirming the trial court's decision herein.

I. RELEVANT DATES

The Opinion of the Court of Civil Appeals for which Appellants seek review was filed on May 7, 2010. No Petition for Rehearing was filed in the Court of Civil Appeals.

II. REASONS FOR REVIEW

The Court of Civil Appeals has decided a question of substance in a way that is not in accord with applicable decisions by the United States Supreme Court and the Tenth Circuit Court of Appeals. The Court of Civil Appeals determined that "the fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, ***belongs*** to the State of Oklahoma and has been transferred to the GRDA." (emphasis added). (Opinion at p. 13). This determination is directly contrary to decisions of the Supreme Court of the United States and the Tenth Circuit Court of Appeals.

The Appellants would further petition that a writ of certiorari issue to review the decision of the Court of Civil Appeals because the decision is not in accord with Oklahoma law.

III. STATEMENT OF FACTS

GRDA was created by the Oklahoma Legislature in 1935 pursuant to 82 O.S. § 861, *et seq.* which conferred on GRDA the right "[t]o control, store and preserve, within the boundaries of the District, the

water of the Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District" and "to develop and generate water power and electric energy within the boundaries of the District." (82 O.S. § 862).

After its creation, GRDA surveyed the Grand River and adopted a plan for the creation of three dams along the Grand River at Pensacola, Markham Ferry and Fort Gibson. *Grand River Dam Authority v. United States*, 175 F.Supp. 153, 155 (CT.CL. 1959). By 1940, GRDA had constructed the Pensacola dam and had acquired lands, easements and rights of way and had constructed transmission lines, substations and other facilities for the connection of the Pensacola project with the dams contemplated at Markham Ferry and Fort Gibson. *Id.* However, before GRDA could build the Fort Gibson Dam, Congress passed the Flood Control Act of 1941 which authorized the construction of three dams along the Grand River by the U.S. *Id.* The U.S. undertook the construction of the Fort Gibson dam on its own and completed its construction in 1950. *Id.*

GRDA owns and operates the Pensacola Dam on Grand Lake and the Markham Ferry Dam on Lake Hudson. *United States v. Grand River Dam Authority*, 363 U.S. 229, 230 (1960). The U.S. acting through its agent, the U.S. Army Corps of Engineers *owns the land underlying the Fort Gibson Reservoir* and it owns and operates the Fort Gibson Dam. *Id.* The Fort Gibson Reservoir extends from the Fort Gibson Dam on the South to a point on the North side of the

reservoir that is less than a mile from the Markham Ferry Dam.

Four of the Plaintiffs appropriate water *directly from the Fort Gibson Reservoir* (i.e. water standing on land owned by the Army Corps of Engineers). Cherokee County Rural Water District No. 11 appropriates water from a creek or stream that passes over and through its land and flows into the Fort Gibson Reservoir. Peggs Water Company appropriates subsurface ground water from a *water well on its own land*. None of the Plaintiffs appropriate water from any point *above* where the Grand River enters the Fort Gibson Reservoir or any water standing on land owned by GRDA.

IV. THE STATE OF OKLAHOMA DOES NOT "OWN" THE WATER FLOWING IN THE GRAND RIVER OR ANY OTHER NON-NAVIGABLE STREAM FLOWING WITHIN THE STATE AND THEREFORE GRDA HAS NO RIGHT TO SELL WATER FROM THE GRAND RIVER OR ITS TRIBUTARIES

In its analysis, the Court of Civil Appeals states that "[t]he dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts. If the GRDA owns the right to sell the water at issue, then the Water Districts cannot state any cognizable legal theory to support their claim, and the district court properly dismissed their petition." (Opinion at p. 4). If the

reasoning of the Court of Appeals is correct (i.e. if the State owns the water, it has the right to sell the water or convey ownership to GRDA) then the reverse is true. If the State does not own the water, then it does not have the right to sell the water or convey ownership to GRDA.[1]

The Court of Civil Appeals premised its affirmance of the trial court's decision on the concept of state ownership of the water at issue; however, this conclusion is directly contrary to previous decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals which have both concluded that the State of Oklahoma does not possess an "ownership interest" in the water resources located within its boundaries.

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[1] It is a fundamental principal of agency law that a principal may only do through an agent those things that he may lawfully do personally. *Restatement (Second) of Agency § 17.* A principal may not delegate to his agent or nominee authority which he himself does not possess. *Restatement (Second) of Agency § 20.* "In other words, an 'individual may not create an agent who has greater power than the individual himself possesses.'" *U.S. v. Craig*, 896 F.Supp. 85, 89 (N.D.N.Y.,1995). This rule applies not only in the typical principal-agent context but applies equally to an agency of the government. See *U.S. v. Johns*, 336 F.Supp.2d 411, 420 at n. 9 (M.D.Pa.,2004) ("Although this authority was delegated to an agency, the United States Sentencing Commission, the agent can exercise no greater constitutional power than the principal."); See also, *Grand River Dam Authority v. U.S.*, 175 F.Supp. 153, 158 (CT.CL. 1959) (Judge Whitaker notes in his dissenting opinion that "[GRDA], the state's agent, of course has no greater right than its creator, the State of Oklahoma.")

The Court of Civil Appeals has essentially confused the State's police power to regulate the use of non-navigable water within the State with an ownership interest in the water which would allow the State (as the owner of the water) the right to sell the water. The Court of Civil Appeals first cites to *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529 (1908) for the proposition that states "own" the superior right to non-navigable water. Although the *Hudson County* case does articulate that the public has an interest in the state *maintaining* the rivers within the state, the case does not stand for the proposition that a state "owns" the non-navigable water within its boundaries.

Hudson County also does not support the theory of state ownership because it is based on the Supreme Court's earlier decision in *Geer v. Connecticut*, 161 U.S. 519, 16 Sup. Ct. Rep. 600 (1896). "*Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them." *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 950, 102 S.Ct. 3456, 3461 (1982). In *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727 (1979), the Supreme Court expressly overruled *Geer* and "traced the demise of the public ownership theory and definitively recast it as 'but a ***fiction*** expressive in legal shorthand of the importance to its people that a State have power to ***preserve and regulate*** the

exploitation of an important resource,'" *Sporhase*, 458 U.S. at 950-951. (emphasis added).

In *Hughes,* the owner of a commercial minnow business in Texas was arrested for transporting natural minnows seined from the waters of Oklahoma to Texas for resale in violation of an Oklahoma statute. *Hughes*, 441 U.S. at 323-324. Hughes challenged the statute as unconstitutional because it was repugnant to the Commerce Clause. *Id.* at 324. The Oklahoma Court of Criminal Appeal affirmed, stating:

> "'The United States Supreme Court has held on numerous occasions that the wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. ***Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein***. *Lacoste v. Department of Conservation*, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1924); *Geer v. State of Connecticut,* 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896). . . . As stated in *Lacoste, supra*, protection of the wildlife of a state is peculiarly within the police power of the state, and the state has great latitude in determining what means are appropriate for its protection.'" (emphasis added).

Id.

In reversing the decision of the Oklahoma Court of Criminal Appeals, the United States Supreme Court looked to the decision in *Geer* and cases decided subsequent to *Geer*. The Supreme Court noted that the decision in *Geer* rested on the holding that no interstate commerce was involved. In reaching this conclusion, the Court stated:

> This conclusion followed in turn from the view that the State had the power, as representative for its citizens, who "owned" in common all wild animals within the State, to control not only the *taking* of game but also the *ownership* of game that had been lawfully reduced to possession. By virtue of this power, Connecticut could qualify the ownership of wild game taken within the State by, for example, prohibiting its removal from the State: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." Accordingly, the State's power to qualify ownership raised serious doubts whether the sale or exchange of wild game constituted "commerce" at all; in any event the Court held that the qualification imposed by the challenged statute removed any transactions involving wild game killed in Connecticut from *interstate* commerce. (internal citations omitted).

Hughes, 441 U.S. at 327.

The Supreme Court in *Hughes* then noted that the view of the *Geer* dissenters became the predominant

view in subsequent cases. *Id.* at 329. In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740 (1977), the Supreme Court rejected the argument that Virginia's "ownership" of fish swimming in its territorial waters empowered the State to forbid fishing by federally licensed ships owned by nonresidents while permitting residents to fish. In reaching this conclusion, the Supreme Court explicitly embraced the analysis of the *Geer* dissenters stating:

> "A State does not stand in the same position as the owner of a private game preserve and *it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures* ***until they are reduced to possession by skillful capture****. . . . Geer v. Connecticut*, 161 U.S. 519, 539-540, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' (emphasis added).

Hughes, 441 U.S. at 334-335.

Pursuant to this authority, neither the State of Oklahoma nor GRDA "own" the water flowing within the Grand River or its tributaries until such water has been reduced to physical possession. Thus, GRDA

only has the right to sell that water which it has acquired true control and possession over.

The Supreme Court revisited the State "ownership" theory with regard to subsurface groundwater in *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 950, 102 S.Ct. 3456, 3461 (1982). *Sporhase* involved an appeal from the Supreme Court of Nebraska relating to a Nebraska statute that imposed a reciprocity requirement on subsurface ground water that was intended to be transported from Nebraska to another state.[2] *Id.* at 941. The Nebraska Supreme Court found the groundwater not to be an article of commerce relying on *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S.Ct. 529 (1908) (the same case relied on by the Court of Civil Appeals for the proposition that the State of Oklahoma owns the waters within its boundaries). The United States Supreme Court rejected the Nebraska Supreme Court's conclusion that the subsurface groundwater was not an article of commerce based on its prior decisions that the public ownership theory was "but a fiction expressive in legal shorthand of the importance that a State have power to preserve and regulate the exploitation of an important resource." *Sporhase*, 458 U.S. at 950-954.

Following these decisions, the issue of State ownership of water arose again in the Western District of

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[2] One of the Appellants here takes water from a well (i.e., subsurface ground water).

Oklahoma in the case of *Tarrant Regional Water Dist. v. Herrmann*, 2007 WL 3226812 (W.D.Okla.,2007). In *Tarrant*, a Texas water district brought suit against members of the Oklahoma Water Resources Board ("OWRB") seeking a declaration that certain laws limiting the export of water out of the State of Oklahoma were invalid because they were preempted by the Red River Compact and violated the Commerce Clause of the Constitution. *Id.* at *1.

The OWRB moved to dismiss on various grounds including the *Younger* abstention doctrine. *Id.* The Court noted that the *Younger* abstention doctrine required a federal court to abstain from hearing a case where three criteria were met: "[1] an ongoing state judicial (or in a proper case administrative) proceeding, [2] the presence of an important state interest, and [3] an adequate opportunity to raise federal claims in the state proceedings." *Id.* at *5. As to the second element the District Court stated:

> Similarly, the court concludes a sufficiently important state interest, as contemplated by the *Younger* doctrine, is not present here so as to warrant abstention. It is unquestionably true that Oklahoma has a substantial and important interest in regulating the use of water that flows through it. ***Although that interest is not properly grounded in a concept of state ownership of the water, in a strict property law sense***, its interest in managing this important resource is nonetheless a substantial interest. *See*

> *Sporhase v. Nebraska*, 458 U.S. 941, 950-1 (1982).[FN7]
>
> * * *
>
> FN7. *Sporhase* dealt with ground water rather than surface water. However, the court's discussion of *Hudson County Water Company v. McCarter*, 209 U.S. 349 (1908), and *City of Altus v. Carr*, 255 F.Supp. 828 (WD Tex.), summarily affirmed 385 U.S. 35 (1966), and its overruling of *Geer v. Connecticut*, 161 U.S. 519 (1896), upon which *Hudson County* was based, clearly suggest the same principles would apply to surface water. (emphasis added).

Id. at *6.

On appeal, the OWRB challenged the District Court's denial of its Motion to Dismiss under the *Younger* abstention doctrine. The Tenth Circuit interpreted the OWRB's argument as follows:

> The defendants' argument appears to be based on two related premises: (1) that the relief requested in this case makes the suit analogous to the quiet title action in *Coeur d'Alene,* and (2) ***that invalidating the anti-export laws would encroach on Oklahoma's "ownership" interests in its natural resources***, much like a favorable judgment would have done in *Coeur d'Alene*. (emphasis added).

Tarrant Regional Water Dist. v. Sevenoaks, 545 F.3d 906, 913 (C.A.10 (Okla.),2008). In addressing the second argument, the Tenth Circuit concluded:

> ***It is also well-established that Oklahoma does not enjoy an "ownership interest" in water resources located in the state***. *See Sporhase v. Nebraska*, 458 U.S. 941, 950-52, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982). (emphasis added).

Tarrant Regional Water Dist. v. Sevenoaks, 545 F.3d at 913.

The Court of Civil Appeals concluded that " . . . the fundamental right to the water of the Grand River, including that water [situated on the land owned by the Army Corps of Engineers] within the Fort Gibson reservoir, belongs to the State of Oklahoma and has been transferred to GRDA." (Opinion at p. 13). This conclusion is directly contrary to the decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals. Pursuant to those decisions,[3] the State of Oklahoma does not "own" the water within its boundaries and therefore cannot "sell" the water within its boundaries nor "sell" water which has accumulated on the land of

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[3] *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727 (1979), *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740 (1977); *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906 (C.A.10 (Okla.),2008).

others.[4] Because the decision of the Court of Civil Appeals is based on the erroneous conclusion that the State of Oklahoma owns the water in the Grand River, its decision must be reversed and remanded.

V. GRDA HAS NO AUTHORITY TO SELL WATER TAKEN FROM WATER WELLS ON PRIVATE LAND

The Court of Civil Appeals conceded that Peggs Water Company appropriates subsurface water from a well located on its property. (Opinion at p. 4). Although not directly addressing the issue, it appears from its Opinion that the Court of Civil Appeals believes that GRDA can sell water from any source within its territory.[5] There is no statutory authority for GRDA to claim ownership of subsurface water taken from wells situated on land owned by another (Peggs Water Company here). Correspondingly, GRDA has no right to sell to Peggs Water Company water that already belongs to Peggs Water Company.

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[4] Moreover, in *United States v. Grand River Dam Authority*, 363 U.S. 229, 80 S.Ct. 1134 (1960), the United States Supreme Court noted that GRDA had failed to trace Oklahoma's title to ownership of the waters of the Grand River and could not show any specific grant of title from the United States to the State. *Id.* at 233-235.

[5] At p. 4 of its Opinion, the Court of Civil Appeals states "[a]ll of the water taken by the Water Districts comes from within the conservation and reclamation district (the Grand River water district) established by the State of Oklahoma to preserve, protect and distribute the waters of the Grand River.

82 O.S. § 862 provides as follows:

> The district shall have and is hereby authorized to exercise the following powers, rights and privileges:
>
> (a) To control, store and preserve, within the boundaries of the district, ***the waters of Grand River and its tributaries***, for any useful purpose, and to use, distribute and ***sell the same*** within the boundaries of the district . . .

(emphasis added).

To the extent that this statute provides GRDA with the authority to sell water from the Grand River or its tributaries (which Appellants expressly challenge), it does not grant GRDA any authority to assert ownership over nor sell subsurface water taken from water wells. The statute specifically limits GRDA's authority to water within the Grand River and its tributaries. The statute does not purport to grant GRDA authority over all water within its district but only that water within the Grand River and its tributaries. Accordingly, GRDA has no authority to sell water appropriated by a land owner from water wells on private land and the decision of the Court of Civil Appeals as to Peggs Water Company must be reversed and remanded.

VI. CONCLUSION

Appellants respectfully urge this Court to issue its Writ of Certiorari to review the Opinion of the Court of Civil Appeals of the State of Oklahoma, Division II entered herein on May 7, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Matthew Bickell, hereby certify that on the 7th day of May, 2010, I mailed a true and correct copy of the foregoing Petition for Writ of Certiorari to the following persons by depositing it in the U.S. Mail, postage prepaid:

James M. Reed
Michael D. Graves
John T. Richer
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708

I further certify that a copy of the Petition for Writ of Certiorari was mailed to, or filed in, the Office of the Craig County Court Clerk on the 27th day of May, 2010.

/s/ C. Matthew Bickell
C. Matthew Bickell